(1)

90-19

No. _____



In The

# Supreme Court of the United States

October Term, 1989

LISA JONES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the defendant's Sixth Amendment right to adequate assistance of counsel was violated by her trial counsel's conflict stemming from his multiple representation of other Drexel Burnham Lambert clients?

2. Whether the defendant's Sixth Amendment right to adequate assistance of counsel was violated by her trial counsel's personal conflicts of interest?

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## PETITION FOR WRIT OF CERTIORARI

Lisa Ann Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the District Court is unreported. [App., *infra*, A1-A13.] The opinion of the United States Court of Appeals for the Second Circuit is not yet reported. [App., *infra*. B1-B21.]

## JURISDICTION

The jurisdiction of this Court is invoked under 28 USC § 1254(1). The judgment of the United States Court of Appeal for the Second Circuit was entered on March 30, 1990.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defence.

## STATEMENT OF CASE

Lisa Jones petitions for review of a Court of Appeals judgment affirming her conviction for perjury and obstruction of justice before a grand jury. Jones' conviction should be reversed because, from before the time of her first grand jury appearance until after the trial jury's verdict, she was never represented by an attorney whose loyalty was only to her.

During the time relevant to this case Jones was a low-level employee at the investment firm of Drexel Burnham Lambert ("Drexel"). When Jones prepared and appeared for her grand jury testimony she was represented by Drexel's attorneys, even though Drexel was a primary target of the grand jury's investigation. Drexel's attorneys continued to represent her after she invoked her Fifth Amendment privilege, after she was granted immunity and even after the prosecutor told them he believed she was committing perjury. They did this although it was apparent that if Jones testified in a manner the prosecutor thought was truthful, she would implicate Drexel in what the Government believed was a crime.

When Jones finally was afforded her own lawyer Drexel's attorneys refused to allow him to see the notes of her preparation to testify before the grand jury, on the ground that they were protected by Drexel's attorney-client privilege. It is difficult to imagine what could be more relevant to an attorney's preparation against a charge of perjury before the grand jury than to examine and analyze what his client said and was told prior to and after testifying.

Jones' trial attorney did not make any motions regarding her representation before the grand jury by Drexel's attorneys or use their representation as part of his trial strategy. Nor did he seek to compel them to turn over the notes they made while they were representing Jones.

In analyzing whether to take such actions, Jones' trial attorney was burdened by a conflict of his own. While representing Jones he also was representing five other Drexel employees in connection with the Government's investigation. It was very much in these clients' interests for their attorney to be on good terms with Drexel and its lawyers. Thus, if Jones' attorney pursued defenses on behalf of Jones that might antagonize Drexel and its lawyers, he risked prejudicing his other clients.

Jones' trial attorney also had another serious conflict. On August 2, 1988, he and Jones attended a meeting at the United States Attorney's Office in New York. After the prosecutors played a tape recording of Jones and a government witness, her attorney sent them a letter purporting to state Jones' refreshed recollection concerning matters about which she had been asked in the grand jury. The letter, which he dictated from the airport in New York to his office in Los Angeles, was telecopied to the prosecutors without him or Jones ever seeing it.

After the letter was sent, both prior to and at trial, Jones told her attorney that she did not remember some of the facts contained in the letter. As the result of statements made by the prosecutor at trial, Jones' attorney feared that he, himself, might face sanctions if Jones testified that she did not remember such facts. Despite

this obvious, serious personal conflict precipitated by the prosecutor's remarks, the attorney continued to represent Jones and to advise her concerning her lack of recollection as it related to the letter. This conduct takes on special significance in view of the same attorney's later motion for a new trial based on allegedly newly-discovered evidence that Jones "might have a defective memory based on some mental or psychological impairment." Alone and taken together, these conflicts by Jones' trial counsel denied her adequate assistance of counsel.

**A. Indictment and Trial.**

A judgment of conviction against Lisa Ann Jones was entered on August 23, 1989, in the United States District Court for the Southern District of New York, following a six-day jury trial before the Honorable Leonard B. Sand.

Indictment 88 Cr. 824 was filed in the Southern District of New York on November 9, 1988. Counts One through Five of the Indictment charged the defendant with making false statements before the grand jury in violation of 18 U.S.C. § 1623, during three appearances within a two-week period in January 1988. Counts Six through Eight charged the defendant with obstruction of justice in violation of 18 U.S.C. § 1503, during the same three appearances.

Trial commenced on March 14, 1989. The jury returned its verdict on March 22, 1989. The jury convicted the defendant on seven counts. The jury acquitted Jones on Count Six, which charged obstruction of justice at her first grand jury appearance.

**B. Post-Trial Proceedings.**

On April 21, 1989, new counsel substituted for the defendant. A motion for new trial based on ineffective assistance of counsel and violation of Federal Rule of Evidence 404(b) was heard on May 25, 1989. By order dated June 14, 1989, the district court denied the motion for new trial based on lack of jurisdiction under Federal Rule of Criminal Procedure 33, because the motion was not filed within seven days after the verdict. On August 23, 1989, the defendant was sentenced to eighteen months' incarceration on each of the seven counts, to run concurrently, followed by two and one-half years of supervised release, a fine of $50,000, and a special assessment of $50 per count. A timely notice of appeal was filed on August 25, 1989.

In granting bail on appeal, Judge Sand found that a "substantial question of law or fact likely to result in reversal" was raised by the defendant's claim that she was denied effective assistance of counsel due to her trial lawyer's conflicts of interest.[1] Citing this Court's decision in *United States v. Randell*, 761 F.2d 122, 125 (2d Cir.), *cert. denied*, 474 U.S. 1008 (1985), Judge Sand found that the conflict issue " 'is a "close" question or one that very well could be decided the other way.' "

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[1] In a hearing on April 21, 1989, when Jones' new counsel informed the Court that he would be raising issues relating to trial counsel's conflict of interest, Judge Sand stated: "This case has always been troubling, and in many respects, and I think I should make no further comment on why it's troublesome."

### C. Appeal From Judgment of Conviction.

Lisa Jones appealed the judgment of conviction on several grounds, including error by the district court in sentencing and that her trial counsel's conflicts of interest deprived her of her Sixth Amendment right to effective assistance of counsel. Court of Appeals Joint Appendix, 578-582. On March 30, 1990, the Court of Appeals entered its judgment affirming the convictions and vacating the sentence and remanding for resentencing. On June 22, 1990, Judge Sand resentenced Jones to ten months' incarceration, two and one half years probation, and required her to pay the cost of her incarceration, $14,800.00.

### D. The Grand Jury Testimony At Issue.

The grand jury before which Jones testified was investigating, among other things, an alleged "stock parking" scheme between Drexel and Princeton/Newport Partners, L.P., another investment firm. Stock parking occurs when parties make it appear that a sale of stock has taken place when, in fact, there is a secret agreement that the "selling" party maintains control of the stock and will repurchase it at a later time. One motive for such transactions could be to allow the selling party to claim tax losses to which it is not entitled.

Jones was convicted for falsely denying (1) that Drexel bought certain securities from Princeton/Newport with the "understanding" that Drexel would sell those securities back to Princeton/Newport; (2) that Drexel assessed "cost of carry" charges for such transactions; (3) that she had conversations about such transactions; (4) that she had conversations about the "cost of carry"

charges; and (5) that she kept records regarding such transactions.

**E. Jones' Representation Before The Grand Jury.**

In December 1987, Jones received a subpoena to appear before a federal grand jury that was investigating possible criminal violations by Drexel. At the time of her testimony, Jones was a 24-year-old assistant trader at Drexel.

Jones was the first Drexel employee subpoenaed to testify before the grand jury. She was represented in connection with her grand jury testimony by the same attorneys who were representing Drexel in the criminal investigation: Cahill, Gordon & Reindel ("Cahill") and Curtis, Mallet-Prevost, Colt & Mosle ("Curtis, Mallet").

On January 13, 1988, Jones appeared before the grand jury. Before she began to testify, the Assistant United States Attorney told her that she had a right to independent counsel. Jones stated that she understood. Jones was asked if she was satisfied with her attorneys and she replied, "A[t] this point of time, yes."[2] Jones invoked her Fifth Amendment privilege and was granted immunity.

During Jones' testimony on January 13, 1988, she left the grand jury room. When she spoke to her attorneys, she was very upset and was crying. While Jones was speaking to her attorneys, the Assistant United States

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[2] Once Jones began to testify on January 13, the United States Attorney's Office never again advised her about her right to independent counsel and never again asked her if she was satisfied with her lawyers.

Attorney approached them and stated that he believed Jones was committing perjury.

Prior to and during Jones' grand jury testimony, the attorneys from Cahill and Curtis, Mallet were aware that the United States Attorney's Office was investigating whether Drexel had engaged in what the prosecutors viewed as an illegal "parking" scheme. The attorneys from Cahill and Curtis, Mallet also understood that the prosecutors were contending that Jones had knowledge of the parking scheme and that she was lying when she denied such knowledge. If Jones had given the testimony that the prosecutors said they believed was truthful, she would have implicated Drexel in "parking" activities.

When Jones testified before the grand jury, the Government already had sworn testimony from her counterpart at Princeton/ Newport, William Hale, that Jones and Hale had engaged in stock parking. At the time, however, the United States Attorney's Office was taking the position that it would not disclose to Drexel's attorneys any evidence concerning Drexel's suspected wrongdoing. The United States Attorney's Office would have been more likely to disclose such evidence to Jones' attorney if her attorney had not also been representing Drexel.

### F. Jones' Representation By Trial Counsel.

#### 1. The August 2, 1988 Letter.

In mid-July 1988, Jones retained Brian O'Neill, an attorney recommended to her by Drexel's lawyers. On August 2, 1988, the United States Attorney's Office

played for Jones and O'Neill a tape recording of a telephone conversation between Jones and Government witness William Hale. On the tape recording, Jones and Hale discuss a transaction of the type Jones was questioned about before the grand jury.

At the airport on the way back to California, O'Neill dictated a letter over the telephone to his office. The letter, addressed to one of the prosecutors, set forth a number of facts that Jones purportedly remembered as a result of listening to the tape. Neither O'Neill nor Jones saw, let alone reviewed, the letter before it was telecopied to the United States Attorney's Office the same day.

In November 1988, Lisa Jones was indicted for perjury and obstruction of justice in connection with her appearances before the grand jury.

**2. The Notes Relating To Jones' Grand Jury Testimony.**

Prior to trial, O'Neill requested to see the notes that the attorneys from Cahill and Curtis, Mallet had taken in connection with Jones' preparation to testify before the grand jury. Attorneys from Cahill and Curtis, Mallet responded that they did not want to show O'Neill the notes because they were protected by Drexel's attorney-client and work product privileges and Drexel would not waive them. An attorney for Curtis, Mallet gave O'Neill general hypotheticals about what he might find if he read the notes. O'Neill did not seek in any way to compel production of the notes.

### 3. Jones' Trial Testimony And The August 2 Letter.

Jones' trial began on March 14, 1989. Prior to the trial and as late as the beginning of her cross-examination, Jones did not remember some of the transactions and conversations described in the August 2 letter and told O'Neill so.[3]

Early in Jones' cross-examination, on Thursday, March 16, 1989, the following exchange occurred:

> Q. Miss Jones, can you recall any conversation other than the one played in court in which you spoke to Mr. Hale on the subject I just asked you about?
>
> A. No, I cannot.

After Jones' answer prosecutor Hansen indicated that he intended to question her about the August 2 letter and the jury was excused.

After the jury left, the prosecutor engaged in what the Second Circuit referred to as "hysterics" and "his tirade." Opinion of the Court of Appeals, App. B-14. He expressed his "outrage," noting that "there are a number of ethical and disciplinary considerations involved here." He stated, "I can't believe what I heard," and repeated that, "I believe this raises a serious problem with Mr. O'Neill's continued representation given what's just occurred." The prosecutor again alluded to the applicability of the ethical and disciplinary rules regarding the

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[3] In their declarations filed in response to the new trial motion, neither O'Neill nor his associate, Eileen McDevitt, disputes these assertations.

conduct of attorneys and stated, "It is a terrible thing to have happened, and I am very upset. . . . "

The colloquy ended with the prosecutor citing the sections of the Model Code of Professional Responsibility dealing with an attorney knowingly using perjured testimony. He stated that he wished to consult with the appeals unit of the United States Attorney's Office. The Court requested the parties to return at 4:00 p.m.

During the recess, Jones met with O'Neill's associate, Eileen McDevitt. They discussed the subject of Jones' testimony as it related to the August 2 letter. According to McDevitt, Jones stated to her that the contents of the letter were accurate.

At the 4:00 p.m. hearing, the Court found that the question to Jones at issue had been ambiguous and that the answer was not necessarily inconsistent with the August 2 letter. In response to a question by the Court, O'Neill stated: "Your Honor, I assume the defendant will not take the stand and testify contrary to representations in the letter." O'Neill noted that "to the extent that it becomes a semantic battle between Ms. Jones and the prosecutor, I see myself as almost having to remove myself from her representation. . . . " The Court ruled that the August 2 letter would be admissible if, and only if, Jones testified inconsistently with the representations contained in it. Court was then adjourned until Monday, March 20, 1989.

On March 17, 1989, O'Neill spoke with Mark O'Donoghue, an attorney for Drexel. O'Neill stated that he had taken Jones for a long walk to discuss the issue of her testimony as it related to the August 2 letter and that

Jones was going to testify consistently with the letter. O'Neill further stated that he had told Jones that if she testified inconsistently with the letter, there would be a mistrial and O'Neill would be a witness against her. O'Neill also told O'Donoghue that Hansen had threatened both Jones and O'Neill with perjury indictments if Jones testified inconsistently with the letter. During the same weekend, O'Neill stated to Roy Regozin, another attorney representing Drexel, that if Jones testified inconsistently with the letter, "Hansen might come after me."

O'Donoghue urged O'Neill to have Jones speak to an independent attorney. Jones met with attorney Robert Costello on Sunday, March 19, 1989. Costello was not aware when he spoke to Jones that there was any reason to believe that she had previously told O'Neill that she did not remember facts contained in the August 2 letter.

On Monday, March 20, 1989, Jones resumed her testimony. The prosecutor began his cross-examination by reading to Jones the last question put to her and her answer to it. She corrected her testimony and admitted to having conversations with William Hale.

The prosecutor next asked Jones if she had participated in similar conversations with Paul Berkman. Jones responded that she did not remember having such conversations. The prosecutor then showed Jones the August 2 letter, whereupon she testified that she did have such conversations. Thereafter, there were no instances where Jones testified that she did not recall events described in the letter.

## REASONS FOR GRANTING THIS PETITION

A criminal defendant's right to be represented by counsel loyal only to the defendant is one of the most basic and fundamental rights guaranteed by the Constitution. The right to vigorous, unbiased representation is important not just to the defendant herself, but also to society's interest in the rendition of just verdicts in criminal cases. The appearance of justice, as well as justice itself demands that in every criminal case the defendant is represented by counsel whose loyalty is undivided.

This Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), noted that the duty of loyalty was "perhaps the most basic of counsel's duties." In *Cuyler v. Sullivan*, 446 U.S. 335 (1980) this Court held that a defendant who demonstrates her lawyer was burdened by an actual conflict of interest adversely affecting the attorney's performance need not establish prejudice in order to obtain reversal of her conviction. *Id.* at 349. The decision herein by the United States Court of Appeals for the Second Circuit directly conflicts with the principles set forth in *Cuyler v. Sullivan* in that it affirmed judgment of conviction returned after a trial in which the defendant was represented by counsel with an undeniable conflict of interest that adversely affected his performance.

This Court has heretofore not addressed counsel's conflict of interest under the circumstances presented by this case. This case arose out of a so-called "white collar crime." The defendant was a low level employee of a large securities firm. The multiple representation that gave rise to one of the conflicts of interest consisted of counsel's representation of this defendant employee, as

well as the representation of numerous other, considerably higher level corporate employees. Traditionally conflicts in criminal cases result from multiple representation of co-conspirators or co-defendants outside of the corporate context. With the increasing number of prosecutions of financial institutions and their employees it is likely that there will be a concurrent rise in similar multiple representation situations.

Furthermore, this case presents the question of whether a criminal defendant whose attorney is faced with possible criminal charges or disciplinary proceedings arising out of his representation of that criminal defendant is deprived of her Sixth Amendment right to counsel.

## I. O'NEILL'S CONFLICTS OF INTEREST DENIED JONES ADEQUATE ASSISTANCE OF COUNSEL.

O'Neill had a variety of conflicts of interest in connection with his representation of Lisa Jones. These conflicts denied Jones adequate assistance of counsel under the Sixth Amendment.

### A. A Defendant Is Denied Adequate Assistance Of Counsel If Her Trial Attorney Has A Conflict Of Interest.

The Sixth Amendment guarantee of effective assistance of counsel encompasses two correlative rights: the right to counsel of reasonable competence and the right to counsel's undivided loyalty. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Government of Virgin Islands*

*v. Zepp*, 748 F.2d 125, 131 (3d Cir. 1984). Because a defense attorney with a conflict of interest "breaches the duty of loyalty, perhaps the most basic of counsel's duties," a defendant who demonstrates that her lawyer was burdened by an actual conflict of interest that adversely affected the attorney's performance need not establish prejudice in order to obtain reversal of her conviction. *Id.* at 692; *see Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). Unlike incompetent representation, where the impact of counsel's ineffectiveness upon the defense can be measured, conflict-laden representation "is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself." *United States v. Alvarez*, 580 F.2d 1251, 1257 (5th Cir. 1978) (footnote omitted).[4]

### B. O'Neill's Personal Conflict Of Interest Denied Jones Adequate Assistance Of Counsel.

#### 1. The Sixth Amendment Is Violated When The Personal Interest Of Defense Counsel Conflicts With That Of His Client.

The Sixth Amendment's guarantee of conflict-free counsel is violated where defense counsel's personal

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[4] *See Strickland v. Washington*, 466 U.S. at 692 (presumption of prejudice warranted because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests"); *Cuyler v. Sullivan*, 446 U.S. at 349 (once a defendant demonstrates that his counsel was subject to an actual conflict of interest, the court need not " 'indulge in nice calculations as to the amount of prejudice' attributable to the conflict")(quoting *Glasser v. United States*, 315 U.S. 60, 76 (1942)).

interest conflicts with that of his client. *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 135 (3d Cir. 1984). The Second Circuit has held that where an actual conflict arises from an antagonism between the personal interest of defense counsel and the interest of his client, the "adverse effect" required by *Strickland* and *Cuyler* may be presumed.

In *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984), the court held that where a lawyer's defense of his client might result in evidence of the lawyer's own wrongdoing, the lawyer has a personal conflict that violates the client's Sixth Amendment right to counsel. *Id.* at 870. The personal conflict which arises in such a situation, "is always real, not simply possible," and "by its nature, is so threatening as to justify a presumption that adequacy of representation was affected." *Id.*

Thus, upon proof of the existence of such a personal conflict, the defendant demonstrates a *"per se"* violation of the Sixth Amendment. *Id.*[5] A new trial is warranted "even if an adverse effect on [the defendant's] representation has not been shown." *Id.* at 871.

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[5] *See also United States v. Solina*, 709 F.2d 160, 163-65 (2d Cir. 1983) (*per se* violation of Sixth Amendment found where defense counsel not admitted to the bar even though "evidence of [defendant's] guilt was indeed overwhelming"; criminal defendant entitled to be represented by someone "free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his lack of credentials"). *Compare United States v. Osorio Estrada*, 751 F.2d 128, 131-32 (2d Cir. 1984), *cert. denied*, 474 U.S. 830 (1985) (no Sixth Amendment violation where no evidence that defense attorney feared being prosecuted or disciplined).

> While the prospect of allowing someone to defend himself with one hand tied behind his back may present an interesting spectacle in a wrestling ring, the court's "institutional interest in the rendition of just verdicts in criminal cases," [citation omitted], and the proper administration of justice require that a criminal defendant not be so encumbered.

*United States v. Arrington*, 867 F.2d 122, 129 (2d Cir.), *cert. denied*, 58 U.S.L.W. 3213 (1989).

**2. O'Neill Had A Personal Conflict Of Interest.**

O'Neill had a clear conflict of interest in advising Lisa Jones with respect to her defense and testimony at trial as it related to her lack of recollection of facts contained in O'Neill's August 2 letter. First, if Jones testified that she did not remember facts stated in the letter, O'Neill would become a witness and be disqualified from continued representation of Jones. Second, such testimony would raise serious questions about the propriety of O'Neill's actions in dictating such an important document from an airport and sending it to the prosecutor without him or his client having reviewed it. Third, O'Neill believed that if Jones testified that she did not remember facts contained in the August 2 letter, he personally would be in jeopardy either criminally or before the bar disciplinary committee. As a result, O'Neill could not make the disinterested, objective tactical decisions or give Jones the disinterested, objective advice which a criminal defendant has a right to receive from her trial counsel.

The suggestion at trial on March 16, 1988, that Jones might testify that she did not remember facts contained in the August 2 letter, prompted an accusation from the prosecutor that O'Neill might be suborning perjury. That any discrepancy between Jones' trial testimony and the August 2 letter may have been innocent did not eliminate the Government's threat of a criminal or disciplinary investigation. This perceived threat provided O'Neill with a strong personal stake in seeing that Jones testified consistently with the letter and necessarily affected his ability to represent Jones objectively.[6]

Regardless of whether O'Neill had engaged in any misconduct, the accusation of wrongdoing created an actual personal conflict. In *United States v. Arrington*, 867 F.2d 122, 129 (2d Cir.), *cert denied*, 58 U.S.L.W. 3213 (1989), the Second Circuit affirmed the trial court's disqualification of defense counsel – notwithstanding the defendant's proffered waiver of his right to conflict-free counsel – because the lawyer had been accused of participation in an attempt to intimidate a government witness:

> Defendant's [waiver] argument, however, evinces little appreciation for the nature of the conflict enveloping [defense counsel]. [C]ounsel has been placed in the position of having to worry about *allegations* of his own misconduct. As we noted in *Cancilla*, "[w]hat could be more

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[6] O'Neill admits that he "was concerned that the prosecutor would contend that I had violated certain disciplinary rules," but denies that he was concerned that he "might be charged with perjury." O'Neill's fear of a disciplinary proceeding, in itself, created a conflict. Moreover, even if perjury charges were never filed, the threat of a criminal investigation is sufficient to create a conflict of interest.

> of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?"

(citation omitted; emphasis added). *See also Mannhalt v. Reed*, 847 F.2d 576, 581 (9th Cir.), *cert. denied*, 109 S. Ct. 260 (1988) (accusation of similar or related crime sufficient to create actual personal conflict for defense attorney).

O'Neill's stated fears that, if Jones testified inconsistently with the letter, "Hansen might come after" him confirm that he was affected by the prosecutor's accusations.[7] As in *Arrington*, O'Neill was "encumbered with a strong incentive to conduct the trial in a manner that would minimize [his] own exposure." 867 F.2d at 129.

### 3. O'Neill's Conflict Does Not Turn On Whether The August 2 Letter Was Accurate When Written.

Although the district court denied the defendant's motion for a new trial on jurisdictional grounds, it noted in dicta:

> Because there could have been no conflict if the letter accurately reflected Ms. Jones' refreshed recollection, Ms. Jones' present claim must be

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[7] *See also Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988) (Sixth Amendment issue is whether defense attorney had "reason to fear that vigorous advocacy on behalf of his client would expose him to criminal liability or any other sanction"); *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984) (although no "direct evidence" of wrongdoing by trial counsel, potential liability of counsel for aiding and abetting destruction of evidence sufficient to create an actual conflict of interest).

> predicated on the fact that she sought to disavow the contents of the letter.

District Court Opinion at 5, App. A-6. The court went on to note that the evidence before it indicated that Jones had forgotten some of the contents of the proffer letter, but that her memory was refreshed following consultation with her attorneys. District Court Opinion at 7. App. A-8. In sum, the district court found that there was no conflict because Jones does not claim that the letter was inaccurate when it was written. *Id.*

The conflict in this case arises, however, from the fact that before and at least at some point during trial, Jones did not remember facts contained in the August 2 letter. It is not necessary to demonstrate that the letter was inaccurate or even that Jones believed it to be inaccurate at the time it was written. It was enough that, at the time of trial, Jones did not remember facts set forth in the letter. As Professor Hazard states in his declaration:

> It is my opinion that Brian O'Neill violated the Code of Professional Responsibility when he continued to represent Jones after it became apparent that she did not remember some of the transactions and representations contained in his August 2, 1988 letter.
>
> O'Neill dictated the letter and sent it to the prosecutor without Jones' prior review. O'Neill drafted the letter under circumstances which provided, at the very least, significant opportunity for inadvertent misrepresentation of Jones' recollection. Thus, O'Neill placed himself in a position where his professional reputation could be impugned by testimony inconsistent with the August 2 letter. O'Neill's personal interest in testimony consistent with his August 2 letter affected or reasonably could be expected

> to affect his ability to give Jones the disinterested, objective advice which a criminal defendant is entitled to receive from her trial counsel.
>
> The conflict between O'Neill's personal interests and those of his client was intensified by the Government's suggestion, during trial, that he might be suborning perjury if Jones testified inconsistently with the representations contained in the August 2 letter.

The magnitude of this conflict is demonstrated by the fact that O'Neill, himself, filed a motion for a new trial on the ground of "newly discovered evidence" that Jones has a defective memory. In his affidavit in support of a new trial, O'Neill states:

> Based upon answers Ms. Jones provided on cross-examination, *it occurred to me for the first time* that Ms. Jones might have a defective memory based upon some mental or psychological impairment.

Yet, it is undisputed that O'Neill was well aware even before trial that Jones did not remember statements that O'Neill says she made to him and that were incorporated in the August 2 letter. O'Neill unquestionably had a conflict in evaluating how to use this lack of recollection in Jones' defense.

**4. Jones' Consultation With Another Attorney Did Not Alleviate O'Neill's Conflict Of Interest.**

Although Jones consulted with attorney Robert Costello prior to her resumption of testimony on March 20, her lack of memory of the events described in the August

2 letter – the very basis of her trial counsel's conflict of interest – was not discussed. Costello's affidavits disclose that he was never informed that Jones had stated that she did not remember certain events described in the letter. Moreover, by the time of her meeting with Costello, Jones already had consulted with and been advised by O'Neill and his associate on the issue of her testimony vis-a-vis the August 2 letter, and informed Costello that she would testify consistently with the letter. Consequently, Costello never inquired as to Jones' lack of memory regarding the events described in the August 2 letter, and never discussed with her O'Neill's conflict of interest. Costello simply advised Jones that the letter would not be admitted since her testimony would be consistent with its contents.

Given this absence of advice from Costello concerning the very nature of the conflict which enveloped Mr. O'Neill, Jones could not have validly waived her right to conflict-free counsel. Waiver of the right to conflict-free counsel must be knowingly and intelligently made. *United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982). *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waivers of this fundamental right "are not to be lightly or casually inferred." *United States v. Alvarez*, 580 F.2d 1251, 1259 (5th Cir. 1978).

Where the conflict involves an antagonism between the personal interests of defense counsel and the interests of his client, the validity of any waiver should be determined by the trial court and should appear on the record. *Mannhalt v. Reed*, 847 F.2d 576, 580-81 (9th Cir.) *cert denied*, 109 S.Ct. 260 (1988). *See United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986); *United States v. Curcio*, 680 F.2d at

888-90. Jones' debilitated emotional and psychological condition during trial made a voir dire by the court all the more necessary to obtaining a valid waiver.

### C. O'Neill's Conflict From Multiple Representation Of Clients Denied Jones Adequate Assistance Of Counsel.

At the time O'Neill was representing Jones in this case he was also representing five other employees from Jones' department at Drexel in connection with the Government's criminal investigation. As a result of this multiple representation, O'Neill faced a conflict in evaluating whether he should take actions on behalf of Jones that might antagonize Drexel or its attorneys.

O'Neill represented to the district court on November 29, 1988:

> Everybody I have spoken to who worked in [Jones'] department at Drexel is either under indictment, under cloud of imminent indictment, or at least they perceive themselves to be. . . .

If an indictment were threatened or returned against one of O'Neill's other five clients from Drexel it would be very much in that client's interests for his attorney to be on good and cooperative terms with Drexel and its attorneys. The vast storehouse of knowledge and resources in the possession of Drexel and its attorneys would be of great assistance to O'Neill in representing these other individuals.

While O'Neill's representation of Jones and the other employees did not necessarily present a conflict in itself,

it did present a conflict with respect to two important issues that developed in this case: (1) whether Drexel's attorneys had acted properly in representing Jones before the grand jury; and (2) whether Drexel's attorneys were justified in refusing to permit O'Neill to read the notes of Jones' preparation for her testimony before the grand jury. If O'Neill pressed either of these issues on behalf of Jones, he risked antagonizing Drexel and its attorneys in connection with his representation of his other clients. As a result, O'Neill had an actual conflict of interest in representing both Jones and the other Drexel employees.[8]

A defendant seeking to overturn a conviction because of her counsel's multiple representation need show only that "an actual conflict of interest adversely affected [her] lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (footnote omitted). No further showing of prejudice is required to establish a violation of the Sixth Amendment. *Camera v. Fogg*, 658 F.2d 80, 86 (2d Cir.), *cert. denied*, 454 U.S. 1129 (1981).

An "adverse effect" exists where some plausible alternative defense strategy or tactic could have been pursued but was not, and the defense or tactic was inherently in conflict with defense counsel's other loyalties. *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985).

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[8] Jones was entitled to feel that she had her attorney's "undivided loyalty as [her] advocate and champion and could rely upon his 'undivided allegiance and faithful devoted service.' " *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976). A " 'lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.' " *Id.*

*Accord United States v. Aiello*, 681 F. Supp. 1019, 1024 (E.D.N.Y. 1988) (Weinstein, C.J.). A defendant need show only that the defense or tactic "possessed sufficient substance to be a viable alternative," not that it would have been successful. *United States v. Fahey*, 769 F.2d at 836. Where a defendant demonstrates that the failure to pursue a defense or tactic is "logically" related to defense counsel's conflicting loyalty, *Cuyler* is satisfied. *See United States v. Aiello*, 681 F. Supp. at 1024.

In the evaluation of whether to pursue strategies that very well might antagonize Drexel and its attorneys, Jones could have been properly represented only by an attorney who was not constrained by the possibility that taking such actions would impair his ability to represent his other clients. That these strategies might ultimately prove unsuccessful is irrelevant; O'Neill's failure to pursue them – in the face of the conflict between Jones' interests and those of his other clients – is sufficient to show the "lapse in representation" required by *Cuyler*. *See Camera v. Fogg*, 658 F.2d at 87 (where clients have conflicting interests, Sixth Amendment violated if potential defense not raised despite a valid basis for doing so; probability of ultimate success of such a defense irrelevant.)

**1. The Representation Of Jones By Drexel's Attorneys.**

**a. Pretrial Motions.**

There is no evidence that Drexel's attorneys consciously intended to harm Jones in connection with their representation of her before the grand jury. Nonetheless,

their representation raises very real and serious questions. Drexel's attorneys knew that the grand jury was investigating an allegedly illegal stack parking scheme between Drexel and Princeton-Newport involving transactions in which Jones participated. If Jones testified in a certain manner, she would implicate Drexel in what the Government believed to be criminal activity.

O'Neill could have made a pretrial motion challenging Jones' representation at the grand jury by Drexel's attorney. She was entitled to have the advisability of bringing such a motion evaluated by an attorney whose undivided loyalty was to her and who could address the issue without having to consider whether his actions would impair his representation of five other clients. O'Neill could not do so, because bringing such a motion could be expected to antagonize Drexel and its attorneys.[9]

**b. Trial Strategy.**

A trial strategy that may have had significant jury appeal would have been to attack Drexel's attorneys in connection with their representation of Jones before the grand jury. Jones was an unsophisticated, frightened, low-level employee who, even under the Government's theory, was carrying out the wishes of superiors. An argument that Jones had been prepared for her testimony and advised by Drexel's attorneys, who had an interest in

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[9] In his detailed declaration in response to Jones' motion for a new trial, O'Neill offers no explanation for failing to make a pretrial motion attacking Jones' representation before the grand jury. Such a motion had to be made before trial or it was waived. See Fed.R.Cr.P. 12(b) and (f).

protecting the company, may well have struck a responsive chord with the jury.

As the trial played out, however, just the opposite occurred. The prosecutor was able to use Jones' representation at the grand jury to the Government's advantage:

> [I]t is not like she didn't meet with lawyers, she met with buckets full and had every chance to prepare. . . .
>
> * * *
>
> [S]he figured that with that battery of Drexel lawyers and so on, she would just keep the money and stonewall. . . .

Thus, facts that could have been used on Jones' behalf were turned against her.

O'Neill cites trial strategy considerations for not calling Drexel's attorneys as witnesses, but does not explain why doing so was necessary in order to attack their representation. While it is impossible to say whether such a strategy would have been successful, Jones was entitled to have an attorney who could evaluate and pursue it without conflict.

### 2. The Notes Relating to Jones' Testimony Before The Grand Jury.

The conflict from O'Neill's multiple representation is even more apparent with respect to the refusal of Drexel's attorneys to provide him with their notes of Jones' preparation for her grand jury testimony. Few things could potentially be more relevant to an attorney's preparation for the trial of a perjury case than what his client said and was told in connection with her testimony at issue. Yet,

when Drexel's attorneys said that they did not want to allow him to see notes of their conversations with Jones, O'Neill did not press to obtain the information through a court order or a subpoena.

It is difficult to conceive of any explanation for this failure other than a desire not to antagonize Drexel and its lawyers.[10] O'Neill's only explanation for failing to insist on seeing the notes is that based on generalized hypotheticals concerning their contents, he did not think the notes were of material benefit to Jones' defense. Generalized hypotheticals are no substitute for an attorney's examining the notes himself. O'Neill's failure to insist on seeing the notes was a "lapse in representation" sufficient to constitute inadequate assistance of counsel.

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[10] There was no merit to the claim that the notes were protected by Drexel's attorney-client privilege. These notes were of conversations between Jones and attorneys who represented her. Any attorney-client privilege with respect to the notes was her own. *See, e.g., General Realty Association v. Walters,* 136 Misc.2d 1027, 519 N.Y.S.2d 530 (Civ. Ct. 1987) (lawyer's duty to preserve client's confidences belongs to the client); E. Cleary, *McCormick on Evidence* at 219-20 (3d ed. 1984) (scope of attorney-client privilege where joint representation). Jones' present attorney has since obtained copies of the 54 pages of notes that Drexel claimed were protected by the company's attorney-client privilege.

## CONCLUSION

Lisa Jones, a low level employee of Drexel Burnham Lambert, is currently facing ten months' imprisonment as the result of a conviction suffered while being represented by trial counsel whose loyalty was, at best, divided. Lisa Jones was deprived of her Sixth Amendment right to adequate assistance of counsel at trial. The Second Circuit's opinion herein conflicts with this Court's decisions in *Strickland v. Washington* and *Cuyler v. Sullivan*. This case presents a unique opportunity for the Court to apply the law with regard to counsel's conflict of interest to situations in which counsel represents multiple employees of one corporate defendant, and when counsel is facing potential criminal charges or disciplinary proceedings as a result of his representation of a criminal defendant. The Court should grant this petition to consider the question of whether the Sixth Amendment has been violated under these circumstances.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

LISA JONES,

Defendant.

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88 CRIM 824
(LBS)

OPINION

APPEARANCES:

June 14, 1989

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HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

Defendant Lisa Jones was convicted of five counts of perjury and two counts of obstruction of justice on March 22, 1989. On March 28, 1989, her trial counsel, Brian O'Neill, moved pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial "upon the grounds that it was discovered for the first time after the trial was completed that Ms. Jones suffered from a deficient memory at the time of her grand jury appearance." In an affidavit accompanying that motion, O'Neill stated:

> Because the examination and testing of Ms. Jones is not completed it is respectfully requested that the court allow counsel leave to supplement Ms. Jones' motion for new trial as more information becomes available from Dr. Portnow. This motion has been filed within the seven days provided by Rule 33.

O'Neill Affidavit of March 28, 1989 at ¶ 7.

On May 13, 1989, successor counsel for Ms. Jones, Daniel H. Bookin, filed a Rule 33 motion based on two other grounds: "O'Neill's Conflicts of Interest Denied Jones Adequate Assistance of Counsel" and "The Evidence of Past Lies Deprived Her of a Fair Trial." Memorandum of Law in Support of Defendant's Motion for a New Trial at i, ii.[1]

The threshold issue presented by the May 13 motion is it timeliness in light of the time limitations imposed by Rule 33 and the further proviso in Rule 45(b).

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[1] Defendant previously alerted the Court to her intention to seek relief at some point based on yet another ground, involving a juror who was not identified during voir dire as being the father of an Assistant United States Attorney in New Jersey. In answer to the Court's inquiry as to whether the interests of justice would best be served if all attacks on the conviction were advanced at one time, Bookin advised the Court in a letter dated June 5, 1989:

> The Court also inquired concerning our intentions with respect to possible motions for a new trial based on the conduct of a juror and on Ms. Jones' psychological state. Absent the revelation of additional evidence, it does not appear at this time that we will be filing such motions.

Accordingly, we will treat defendant's March 28 motion as having been withdrawn.

Rule 33 provides, in pertinent part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. . . . A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Rule 45(b) provides:

> [T]he court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

The Government objects to defendant's attempt to raise issues not encompassed within the first Rule 33 motion as untimely.

In *United States v. Dukes*, 727 F.2d 34 (2d Cir. 1984), the Court of Appeals for the Second Circuit wrote:

> Fed.R.Crim.Pro. 33 allows a district court, upon motion by a defendant, to grant a new trial "if required in the interest of justice." This rule contains explicit time limits: a motion based on "newly discovered evidence" must be made within two years of final judgment, while a motion on any other grounds must be made "within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7 day period." These time limits are jurisdictional. *If a motion is not timely filed, the district court lacks power to consider it.*

*Id.* at 38 (citations omitted) (emphasis added). As here, *Dukes* presented an effort to raise questions of prosecutorial misconduct and ineffective assistance of counsel, which the Court held to be jurisdictionally barred.

In a compendious footnote, see Government's Memorandum in Opposition at 4-5 n.1, the Government cites numerous cases holding that a court lacks jurisdiction to consider claims that are not based on newly-discovered evidence after the expiration of seven days. Perhaps because she cannot dispute this well-established rule, defendant urges that a colloquy with the Court immediately following the verdict could be construed to be the granting of an extension of time for the filing of such a motion.

After setting the date for sentencing to be May 22, 1989, the Court stated:

> . . . I would like to address the suggestion which was made of a possible psychiatric problem, and if there is such a factor or consideration, then it should be addressed promptly rather than on May 22.
>
> . . . .
>
> I would suggest that you do this, that is, if there is a report by a psychiatrist which you are going to want to call to the court's attention prior to sentencing, that you send that to the court and to the probation officer and to Mr. Hansen as promptly as possible . . .

Transcript ("Tr.") March 22, 1989 at 966-68.

Defendant recognizes that the purport of these remarks is a matter of the Court's intent. Tr. May 25, 1989 at 5. The Court never intended its remarks to extend the

time within which a Rule 33 motion could be brought, nor could the remarks reasonably have been interpreted in that fashion. It is entirely clear from the record that May 22 related solely to the date for sentencing, not substantive motions. Moreover, it is this Court's practice not to schedule motions addressed to the validity of a conviction for the same day as sentencing. This avoids any suggestion of an interrelationship between substantive issues and the appropriate sentence to be imposed and also avoids any ambiguity in the defendant's mind as to the nature of the sentencing procedure or what lies ahead. *See id.* at 5-7. There is, therefore, no basis for construing this colloquy to be an extension of the time limitations imposed by Rules 33 and 45(b).

Accepting this, defense counsel asserts that the Court should nevertheless entertain the motion:

> Assuming that – since there was no extension – Ms. Jones is faced with the following predicament: She had an attorney at trial who had a serious conflict with respect to his own personal interest versus hers. That same attorney is the one who had the responsibility of filing a motion attacking himself or seeking an extention so that another attorney might do that. That is the epitome of a conflict.

*Id.* at 7. Even if we were to believe that trial counsel had a conflict of interest – and we do not, see *infra* – all untimely claims of ineffective assistance of counsel are barred by Rule 33's time restraint. *See, e.g., Dukes, supra,* 727 F.2d at 38 (ineffective assistance of counsel claim barred because it was not "evidence . . . disclosed after trial . . . that . . . could not have been discovered sooner with the exercise of due diligence"); *United States v.*

*Brown*, 742 F.2d 363, 368 (7th Cir. 1984) (rejecting Rule 33 motion filed eight weeks after judgment was entered in bench trial because no extension was granted during the original seven-day period and "[t]he allegations of misconduct in the motion on their face refer to actions of Brown's trial counsel known to Brown before and during trial.").

The fact that this Court lacks jurisdiction to consider the May 13 motion does not mean that the claims therein may never be raised. They are simply not appropriate for this forum at this time. *See, e.g., Dukes, supra*, 727 F.2d at 39 (the denial of Rule 33 relief for ineffective assistance of counsel claims "does not leave defendants remediless, since most claims of ineffective assistance of counsel may be brought under § 2255"); *United States v. Holy Bear*, 624 F.2d 853, 856 (8th Cir. 1980) ("We reject the allegation of ineffective assistance of counsel as untimely raised, without prejudice to appellant raising that issue under section 2255.").

However, serious allegations were made in the May 13 motion that challenge the professional reputation and integrity of trial counsel. We therefore requested supplemental affidavits and write briefly on the issues raised.

The motion alleges that Mr. O'Neill was operating under a conflict of interest during trial because of a potential dispute concerning the accuracy of the August 2, 1988 proffer letter to the United States Attorney's Office that outlined Ms. Jones' refreshed recollection of Drexel's "parking" arrangement with Princeton/Newport. Because there could have been no conflict if the

letter accurately reflected Ms. Jones' refreshed recollection. Ms. Jones' present claim must be predicted on the fact that she sought to disavow the contents of the letter.

The record is devoid of any evidence whatsoever that she sought to do that. The only time Ms. Jones even hinted that her testimony might be inconsistent with the August 2 letter was during brief cross-examination on March 16. At that time, however, the Court expressly rejected the Government's contention that her answers were inconsistent with the letter and found that they were simply ambiguous. *See* Tr. March 16, 1989 at 429-30 ("I don't see any inconsistency. . . . I don't see any statement you can point to made by Ms. Jones either on direct or her cross which is contradicted by the August 2 letter . . . ").[2] When the trial resumed following the weekend break, Ms. Jones gave extended testimony that was consistent with the contents of the letter. In fact, Ms. Jones had the following exchange with Mr. O'Neill:

> Q. Did you review the [August 2] letter . . . at one point in time?
>
> A. Yes, I did.
>
> Q. Did it accurately describe what you had instructed your lawyers to tell prosecutors you wanted to tell them?
>
> A. I tried to get my attorney to tell the prosecutors exactly what I remembered and as much as I could and, yes, I believe it did.

---

[2] The dispute appeared to be a semantic one over Ms. Jones' knowledge of the term "parking." That problem was obviated by a discussion with the Court following the March 16 cross-examination. *See* Tr. March 16, 1989 at 436-39.

Tr. March 21, 1989 at 791. *See also* Tr. March 20, 1989 at 721-24.

Given this testimony, we found it difficult to understand the basis on which defendant's present claims rests. Nonetheless, the Court requested affidavits from the principles – including the defendant, her trial attorneys and independent counsel consulted during the trial – all of which confirm that Ms. Jones did not seek to repudiate the contents of the August 2 letter. Rather, the affidavits paint the following picture: When cross-examination began on March 16, Ms. Jones had forgotten some of the contents of the proffer letter. Over the course of the intervening weekend and following consultation with her attorney and independent counsel, her memory was sufficiently refreshed that she was able to testify consistently with it by the time the trial resumed on March 20.

According to Mr. O'Neill:

> The information contained in the oral proffer and memorialized in the letter was information which was provided to me by Ms. Jones. Ms. Jones never disavowed the information in the oral and written proffer during the time I represented her. I had no reason to believe that the proffer was anything but Ms. Jones' best memory of the events once she was refreshed.
>
> . . . .
>
> I believed then [during the afternoon court session on March 16] as I had always believed that Ms. Jones' memory once refreshed was accurately expressed in the proffer and that she would testify substantially in conformance with the proffer. My only concern was . . . the internal inconsistency of her memory and the semantics problem.

> On the morning of March 17, I had a conversation with Ms. Jones. I categorically deny the inference which is argued in Mr Bookin's papers that I instructed, directed, cajoled or encouraged Ms. Jones to testify in a manner inconsistent with her own memory of events.

O'Neill Declaration of June 8, 1989 at ¶ 14, 18 & 19.

Mr. O'Neill's associate, Eileen McDevitt, also filed a declaration confirming that Jones refreshed her recollection as to the contents of the letter:

> [On March 16, 1989,] I showed [Jones] the [August 2, 1988] letter and asked her to read it. She did so. I asked her if there was anything in the letter that was inaccurate or untrue. She gave me back the letter and said that there was nothing in there that was not correct. I then began reading groups of sentences back to her, asking her each time if they were correct. She responded "yes" as to each group of sentences.
>
> . . . . I told her again that what was important was that we know the truth. During the course of the conversation, I asked her if at any time she thought the contents of the letter were not correct or accurate and she indicated that she had not. . . . I asked her if there was anything when she first read the letter that she thought was incorrect and she responded that here was not.

McDevitt Declaration of June 8, 1989 at ¶ 4 & 5.

Similarly, Robert J. Costello, the independent counsel Ms. Jones consulted on March 19 to advise her on the issue of the potential conflict of interest, confirms that Ms. Jones recalled the contents of the letter:

> I asked Ms. Jones if she would be testifying consistently with the letter. She said her testimony would be consistent.

The declaration of the defendant herself is also consistent with this explanation. Ms. Jones does not contradict the fact that, by the time cross-examination resumed on March 20, 1989, she had refreshed her recollection sufficiently to recall all of the letter:

> Before and during the trial, I did not remember some of the facts stated in Brian O'Neill's August 2, 1988 letter to the United States Attorney's Office. I told that to Brian.
>
> . . . . I told Mr. Costello that I would be testifying consistently with the letter. He gave me a copy of the letter to read over to help me remember what was in it. I did not tell Mr. Costello that my memory had been or was different from what was stated in the letter.

Jones Declaration of June 5, 1989 at ¶ 2.

Because all of the principals involved – including, apparently, the defendant – agree on the events that took place at trial, we find that there was never any conflict, either perceived or actual, between Ms. Jones and Mr. O'Neill. In fact, the only assertions to the contrary are contained in several affidavits filed with the court by lawyers whose relationship to the issues raised can be described, at best, as tangential. *See, e.g.*, Affidavits of Peter Fleming Jr. at ¶ 15 , Geoffrey C. Hazard Jr. at ¶¶ 7 & 14, Mark H. O'Donoghue at ¶¶ 4 & 6, and Roy L. Regozin at ¶¶ 4-5. These affidavits, submitted in support of the May 13 motion for a new trial, are laced with hearsay and are of no value.

Accordingly, we find that the allegations raised concerning Mr. O'Neill's conflict of interest with respect to the August 2 letter are without merit. We also find no grounds for predicating a finding of a conflict based on the mere fact that Mr. O'Neill represented other Drexel employees at the same time he represented Ms. Jones.

Nor does any concern that an unjust result may be caused by our lack of jurisdiction to entertain the motion arise by virtue of defendant's claim of "plain error." Ms. Jones, of course, has the right to present this claim to the appellate courts. We write briefly only because, as is often the case when trial counsel is replaced following a guilty verdict, successor counsel misconstrues certain elements of the trial.

First, we note that the Court sought to be careful about interfering with O'Neill's trial strategy. Early in the trial the Court admonished counsel that it recognized that the defense strategy was complex and subtle in that the sole issue in this case was the credibility of Ms. Jones' grand jury testimony that she did not remember being aware of certain securities transactions. The Court further stated that it would not sua sponte interfere with that strategy. *See* Tr. March 15, 1989 at 99-100.

Defense counsel adopted a strategy of avoiding mention of the past lies. In his impassioned closing argument to the jury, Mr. O'Neill made only a brief passing reference to Ms. Jones' history of expedient lying. Tr. March 21, 1989 at 858. There were sound reasons for Mr. O'Neill to have tried to gloss over that testimony and not to have the Court call any more attention to it. He may well have believed that the best way to deal with the issue was to

bury it in tears and pathos. For the Court to have reminded the jury of Ms. Jones' past pattern of lying when it served her interests to do so would have called even more attention to the past acts he would rather have had the jury ignore. An admonition that the defendant's testimony was relevant only to her credibility on the stand at trial would have been of little solace in a case in which her credibility was, in essence, the sole issue. We do not regard this deference to defense strategy as plain error.

Ms. Jones' current argument that the jury was prejudiced by the recitation of her previous lies grossly overstates the impact of the issues in the case. It was not testimony about Ms. Jones' past lies that appeared to have the greatest impact on the jury. Her testimony clearly indicated that those lies were made so that she could get a job and support herself after running away from home at the age of fourteen. If anything, the recitation of those pat lies painted a sympathetic portrait of a troubled teenager who left an abusive home in order to survive.

What was truly damaging to Ms. Jones was her apparent inability to tell the truth while sitting on the witness stand at trial, the clearest example of which concerned her educational background. Ms. Jones's answer that she did not remember whether she had ever attended a particular college[3] was not merely incredible,

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[3] Particularly devastating to the defendant's credibility was the following exchange on cross-examination:

(Continued on following page)

it was a demonstration of her willingness to invoke a claim of lack of memory when confronted with adverse

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(Continued from previous page)

Q: Do you have any recollection of whether you ever went to California State University at Northridge?

A: I don't know.

Q: You can't recall whether you ever went there?

A: I have been to school there, I just don't remember when.

. . . .

Q: Did you ever enroll in California State University at Northridge?

A: I don't remember.

Tr. March 20, 1989 at 526-27. After she was shown a document that was marked I-20 for identification, the exchange continued:

Q: Is it not a fact, Miss Jones, that you never enrolled in a single class at California State University, Northridge?

A: I may not have.

Q: Is it not a fact that you didn't?

A: Mr. Hansen, I don't remember if I enrolled or not. I guess I didn't. If this says I didn't go there, I didn't.

Q: You did not, is that right?

A: Yes.

. . . .

(Continued on following page)

circumstances. More than anything else in this brief trial, this testimony proved devastating to Ms. Jones' claim that she did not remember certain transactions when questioned before the grand jury. No cautionary instruction could have been given to limit the harm caused by the defendant's own testimony when she, under oath on the witness stand in front of the jury, could not consistently give clear and forthright answers to simple questions.

The Court hereby denies defendant's May 13 motion because it does not have jurisdiction over the issues

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(Continued from previous page)

> Q: Miss Jones, I want to be very clear here. Did you or did you not know that you hadn't gone to school at Northridge at the time you told the Grand Jury that you did?
>
> A: I guess I thought I did, I don't know.
>
> . . . .
>
> Q: Are you telling us that when you told the Grand Jury that you went to California State University, Northridge, you honestly believed you had gone there?
>
> A: Yes.
>
> Q: What was it that made you believe that you had gone to California State University at Northridge?
>
> A: I don't know.
>
> Q: You have no explanation for it?
>
> A: No.

*Id.* at 528-31.

raised and no grounds have been shown why jurisdictional time restraints should not apply.

So ordered.

Dated: New York, New York
June 14, 1989

/s/ Leonard B. Sand
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 583 – August Term, 1989
(Argued January 22, 1990 Decided March 30, 1990)
Docket No. 89-1425

UNITED STATES OF AMERICA,

*Appellee,*

–against–

LISA JONES,

*Defendant-Appellant.*

Before:

KEARSE, MINER, and WALKER,

*Circuit Judges.*

Appeal from judgment entered in United States District Court for the Southern District of New York (Sand, *J.*), after jury trial, convicting defendant of five counts of making false declarations before a grand jury, and two counts of obstruction of justice, and imposing a sentence of imprisonment enhanced for substantial interference with the administration of justice.

Affirmed in part, vacated in part and remanded for resentencing.

HELEN GREDD, Assistant United States Attorney, New York, NY (Louis J. Freeh, Acting United States Attorney for the Southern District of New York, Mark C. Hansen, Assistant United States Attorney, Peter G. A. Safirstein, Special Assistant United States Attorney, New York, NY, of counsel), *for Appellee.*

DANIEL H. BOOKIN, San Francisco, CA (Douglas W. Sortino, Farella, Braun & Martel, San Francisco, CA, of counsel), *for Defendant-Appellant.*

MINER, *Circuit Judge*:

Defendant-appellant Lisa Jones appeals from a judgment of conviction entered August 23, 1989, after a jury trial, in the United States District Court for the Southern District of New York (Sand, *J.*). Jones was convicted of five counts of making false declarations before a grand jury in violation of 18 U.S.C. § 1623 (1988) and two counts of obstruction of justice in violation of 18 U.S.C. § 1503, based on her testimony before a federal grand jury investigating a "securities parking" scheme involving her employer, the investment firm of Drexel Burnham Lambert, Inc. After increasing the base offense level under Sentencing Guidelines § 2J1.3(b)(2) because Jones had "substantially interfered with the administration of justice," the district court sentenced Jones to concurrent terms of imprisonment for 18 months on each count. The court also imposed a fine of $50,000 and a special assessment of $350.

On appeal, Jones asserts her trial counsel was burdened by conflicts of interest, rendering his assistance ineffective. These conflicts are said to arise from the prosecutor's threat of disciplinary charges against Jones' attorney relating to a letter that the attorney had sent to the government in her behalf, and the attorney's concurrent representation of other Drexel employees. The government contends that the district court properly determined after a hearing that no actual conflicts of interest existed.

Jones contends also that the district court erred in allowing cross-examination into her history of making false statements, because this evidence was used, in violation of Fed. R. Evid. 404(b), to prove she acted in conformity with a character for untruthfulness. The government argues that this line of questioning was permissible under Fed. R. Evid. 608(b) and was relevant to her credibility as a witness.

In light of a post-trial revelation that one of the jurors was related to an Assistant United States Attorney for the District of New Jersey, Jones asserts that the district court abused its discretion by refusing to ask specifically whether any jurors had relatives who were government attorneys. The government responds that the court's broad inquiry into possible bias on *voir dire* provided Jones with adequate information to exercise peremptory challenges.

Finally, Jones assigns as error the district court's increase of her base offense level on the ground that she "substantially interfered with the administration of justice" within the meaning of Sentencing Guidelines

§ 2J1.3(b)(2). Jones contests as unsupported by any evidence the government's assertion that her conduct resulted in "the unnecessary expenditure of substantial governmental or court resources." Guidelines § 2J1.3 application note 1. The government argues that unnecessary expenditures could be inferred from the complex nature of its investigation and the information known to Jones.

For the reasons that follow, we affirm the convictions for making false statements before a grand jury and obstruction of justice. However, we find the record insufficient to support the district court's increase of the base offense level under the Sentencing Guidelines and, therefore, we vacate the sentence and remand for resentencing.

## BACKGROUND

Lisa Ann Jones ran away from home in New Jersey at the age of 14 to seek her fortune in California. By misstating her age, she found employment initially at a bank and ultimately found success at the California offices of Drexel Burnham Lambert, where she was hired as an assistant trader. At Drexel her income soared from approximately $20,000 in 1981 to $100,000 in 1988. She dealt with traders and their assistants at other investment firms around the country, working on transactions involving millions of dollars.

On December 17, 1987, Jones was served with a subpoena to testify before a grand jury in the Southern District of New York investigating "securities parking"

transactions between her employer and another investment firm with which she dealt, Princeton/Newport Partners, L.P. "Securities parking" essentially involves a purported transfer of ownership in securities combined with a secret agreement providing the "seller" with the right to repurchase them at a later date. The "seller" receives the tax benefits of a loss realized by the "sale"; the "buyer" is compensated for the "cost of carrying" the securities. Since the agreement to resell ensures that the "seller" never loses control of the securities, the government considers "parking" a form of tax and securities fraud. The government investigator who served Jones with the subpoena asked if she knew of any "parking" deals involving Drexel and Princeton/Newport. Jones denied knowledge of "parking" deals, although she said there had been deals in which Drexel would purchase bonds, only to resell them to Princeton/Newport within 30 or 33 days. Jones asked to speak with an attorney before answering any more questions. The government investigator recommended that she seek counsel independent of the attorneys representing her employer.

Drexel knew of the investigation and had retained two New York City law firms – Cahill Gordon & Reindel and Curtis, Mallet-Prevost, Colt & Mosle – to represent itself and its employees. When Jones appeared before the grand jury on January 11, 1988, she was represented by Drexel's attorneys. Jones did not testify at that time because she requested and received additional time to prepare. At the start of her second appearance on January 13, an Assistant United States Attorney ("AUSA") informed Jones of her rights to have independent counsel and to have an attorney appointed if she could not afford

one. The AUSA told Jones that her attorneys represented Drexel and that her interests and Drexel's interests in the investigation might differ. Jones replied that she was satisfied with her lawyers. When she invoked her fifth amendment right against self-incrimination, Jones was served with a compulsion order granting her immunity from prosecution on the basis of her testimony. She then testified that she could not recall ever discussing or calculating the cost of carrying securities for Princeton/Newport. Jones testified specifically that she never discussed the cost of carrying with William Hale or Paul Berkman of Princeton/Newport, and that she never kept a record of such costs.

Jones returned to the grand jury on January 20 and was reminded of the compulsion order. She was told again that she had been granted immunity from criminal prosecution, but that she had to testify truthfully or she would be subject to prosecution for perjury or obstruction of justice. Jones testified that she had never heard of any instance in which Drexel purchased a security from a client with the understanding that the client would buy it back at a later date. She denied knowledge of any such understanding between Drexel and Princeton/Newport, stating: 'If I knew that there was an agreement or arrangement, I think I would have remembered it." On January 27, Jones testified that she had no information concerning who might have engaged in parking transactions involving Drexel and Princeton/Newport.

On February 23, 1988, the government informed Jones' lawyers that she was a target of a federal grand jury investigating perjury and other possible violations of federal criminal law. Apparently unknown to Jones, her

counterpart at Princeton/Newport, William Hale, had preceded her before the grand jury and had testified to parking transactions involving Drexel and Princeton/Newport. The government also had obtained a tape recording of a telephone conversation between Hale and Jones relating to calculations for the cost of carrying securities Princeton/Newport had sold to, then repurchased from, Drexel. Jones retained new counsel, Brian O'Neill, on July 18 and shortly thereafter learned that an indictment was imminent.

At an August 2, 1988 meeting with representatives of the United States Attorney's Office, Jones and O'Neill heard the recording of the telephone conversation between Hale and Jones. The recording revealed that Jones understood that the securities would be held for 32 days, then resold to Princeton/Newport, and also that she understood the intricate calculations involved in the transactions.

O'Neill discussed the tapes with Jones, who said they had refreshed her recollection of events. In an attempt to avoid an indictment, Jones authorized O'Neill to inform the government of testimony she could provide now that her memory was refreshed. O'Neill so informed the government, and later memorialized that oral proffer in a letter, also authorized by Jones, to the United States Attorney's Office. The proffer letter stated that Jones now recalled discussing with Hale securities to be bought by Princeton/Newport from Drexel at the same price at which Drexel had originally purchased them from Princeton/Newport. Jones and Hale calculated "the cost to Drexel of maintaining Princeton's position in the security," including an accommodation for intervening

changes in the market price. At some point, she recalled learning that there was to be a 31-day interval between purchase and sale. However, Jones denied ever hearing the terms "parking" or "tax trade" used to describe the transactions. She said they were described to her in "cryptic terms" and were once referred to as "program trading." Despite the proffer letter, an indictment was filed on November 9, 1988, charging Jones with five counts of making false statements to a grand jury in violation of 18 U.S.C. § 1623 and three counts of obstruction of justice in violation of 18 U.S.C. § 1503.

Jones testified in her own behalf at trial. On cross-examination, the prosecutor questioned Jones about various transactions similar to those discussed in the tape recorded conversation with Hale. Jones responded that she "had conversations with Mr. Hale that may be like those, but [was] not aware that they were parking." When the prosecutor asked whether Jones and Hale had any conversations, other than the one recorded, "about that subject," the court sustained an objection on grounds that the question was vague and ambiguous. The prosecutor then asked whether Jones had any other conversations with Hale "in which you discussed the parking of securities." A series of objections and rulings ensued, after which the court stated that the question was "whether she ever had conversations with Mr. Hale on that subject." Jones responded, "I don't know all the conversations I had with Mr. Hale." The prosecutor asked whether she could recall any other conversations with Mr. Hale "on the subject I just asked you about?" Jones said no.

The prosecutor then approached Jones and showed her the proffer letter O'Neill had sent to the government.

O'Neill requested a sidebar and the jury was dismissed for the weekend. During the sidebar, the prosecutor expressed "outrage" at the prospect of Jones refusing to admit to statements made in the proffer letter. He also raised ethical considerations concerning O'Neill's representation and cited specific disciplinary rules from the Model Code of Professional Responsibility concerning an attorney's duty not to suborn perjury. The court adjourned until later that afternoon to examine the letter and the testimony and to allow the prosecutor to consult with his office.

During the afternoon recess, Jones conferred with Eileen McDevitt, an attorney who was assisting O'Neill in the trial. Jones told McDevitt that the contents of the proffer letter were accurate, and that at no time had Jones thought anything in the letter was inaccurate.

After comparing Jones' testimony with the proffer letter, the court determined that the testimony did not contradict the information contained in the letter. At best, the questions referring to "that subject" were ambiguous. Moreover, the court read "that subject" to mean "parking," a term which the proffer letter explicitly stated Jones had never heard used to describe the transactions. The court ruled that the proffer letter would be inadmissible unless Jones contradicted it in her testimony. The prosecutor never again threatened O'Neill with any disciplinary charges.

O'Neill arranged for Jones to consult with Robert J. Costello, an attorney not connected to the case, over the weekend recess. He explained to Costello that there was a potential conflict because he had written a proffer letter

for Jones and might be called as a witness. O'Neill said he expected Jones' testimony to be consistent with the letter. Jones and Costello met, and each stated later that Jones had expressed an intention to give testimony that would be consistent with the letter.

When cross-examination resumed, Jones did not contradict the terms of the proffer letter. Nevertheless, following her conviction and a substitution of counsel, Jones moved for a new trial pursuant to Fed. R. Crim. P. 33 on the ground, inter alia, that the threat of disciplinary charges against O'Neill created a conflict of interest rendering his assistance ineffective. Although the district court determined it did not have jurisdiction over the motion because it had not been made within seven days of the verdict, the court decided to address what it considered "serious allegations" challenging the "professional reputation and integrity of trial counsel."

The court found the record devoid of any showing of intent by Jones to disavow the proffer letter. O'Neill, his associate, and the attorney Jones consulted over the weekend recess each stated that Jones had indicated her intent to give testimony consistent with the statements made in the proffer letter. Although Jones stated in a declaration submitted in connection with the motion for a new trial that there were times when she could not remember some of the details mentioned in the letter, she affirmed that she never intended to contradict the letter. In ruling on the motion, the court reiterated its earlier finding that the questions asked on cross-examination were ambiguous and that Jones' answers were not inconsistent with the proffer letter. In the absence of any showing that the statements in the proffer letter were false, the

court held that no actual conflict existed between Jones and O'Neill and denied the motion for a new trial.

Jones's sentence for making false statements before a grand jury was calculated by first applying the Sentencing Guideline for perjury, which prescribes a base offense level of 12. Guidelines § 2J1.3(a). All five false statement counts, as well as the two obstruction of justice counts, were considered as a group for sentencing purposes pursuant to Guidelines § 3D1.2(c). *See* Guidelines § 2J1.2 application note 3. Under Criminal History Category I, assigned to Jones because she had no prior convictions, a base offense level of 12 would result in a sentencing range of 10 to 16 months. Guidelines ch. 5, pt. A, Sentencing Table. The government argued for an upward adjustment of the base offense level by three levels, resulting in a sentencing range of 18 to 24 months, because Jones had "substantially interfered with the administration of justice" by causing "the unnecessary expenditure of substantial government or court resources." Guidelines § 2J1.3(b)(2) & application note 1. Proof of unnecessary expenditures, the government asserted, could be inferred from the complex nature of the investigation and the information withheld by Jones.

Jones argued that the government's vague, general assertions did not suffice to prove by a preponderance of the evidence that her false statements before the grand jury resulted in the unnecessary expenditure of substantial resources. In opposition to the government's request for sentencing enhancement, Jones submitted an affidavit by Theodore V. Wells, an attorney who represented one of the defendants in the Princeton/Newport "securities parking" trial. Wells stated that the Princeton/Newport

defendants did not contest the existence of a parking arrangement or Drexel's calculation of the cost of carrying securities. Rather, their defense was that these activities were not illegal because the transactions had economic substance. The fact that Jones had denied knowledge of parking arrangements and denied calculating the cost of carrying securities did not warrant an inference of increased expenditures related to the Princeton/Newport trial, because the pertinent information was available to the government at an early stage. Wells noted that Hale had provided the government with details of parking transactions before Jones' grand jury testimony. An affidavit by a government investigator submitted in support of a search warrant for Princeton/Newport's offices also described the transactions in great detail prior to Jones' appearance before the grand jury.

The district court initially suggested that it would increase Jones' base offense level under the Guidelines section for substantial interference with the administration of justice because the presentence report had recommended such an enhancement. When counsel for Jones objected, the court entertained argument from both sides. The court rejected Jones' arguments, and apparently settled on an offense level of 15 because there had been "three separate instances of perjury after the advice and admonitions given to the defendant, and the further perjury at the trial." Perceiving that the perjury resulted in substantial interference with the administration of justice, the court imposed a sentence of imprisonment for 18 months on each count, to run concurrently.

## DISCUSSION

### I. *Effective Assistance of Counsel*

Jones asserts she was denied effective assistance of counsel in violation of her rights under the sixth amendment, because the prosecutor's threat of disciplinary charges against O'Neill created a conflict of interest between attorney and client. Ordinarily, a defendant asserting ineffective assistance of counsel must establish both that her attorney's conduct fell below an objective standard of reasonableness, *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and that but for this deficient conduct the result of the trial would have been different, *id.* at 694. However, prejudice is presumed when a defendant can "establish that an actual conflict of interest adversely affected [her] lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

An actual conflict of interest exists when an attorney engages in wrongful conduct related to the client's trial. *United State v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984); *Solina v. United States*, 709 F.2d 160, 164 (2d Cir. 1983). In such a situation, the fear of prompting a government investigation into the attorney's own wrongdoing would preclude an attorney from asserting a vigorous defense in behalf of his client. Jones seeks to extend this rule to reach an instance where the prosecutor threatened disciplinary action, without proof that the allegation of wrongdoing had any basis in fact or law.

When allegations are supported by some credible evidence, disciplinary or criminal charges become more than mere threats, and the attorney has "reason to fear that vigorous advocacy on behalf of his client would

expose him to criminal liability or any other sanction." *Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988). However, "a reviewing court cannot presume that the *possibility* for conflict has resulted in ineffective assistance of counsel." *Cuyler v. Sullivan*, 446 U.S. at 348 (emphasis added). The defendant must identify an actual conflict of interest. *United States v. Lovano*, 420 F.2d 769, 773 (2d Cir.) *cert. denied*, 397 U.S. 1071 (1970). Allegations of wrongdoing alone cannot rise to the level of an actual conflict unless the charges have some foundation. *See United States v. Osorio Estrada*, 751 F.2d 128, 132 (2d Cir. 1984), *aff'd on reh'g* 757 F.2d 27, 29 (2d Cir.), *cert denied*, 474 U.S. 830 (1985); *cf. United States v. Arrington*, 867 F.2d 122, 125 (2d Cir. (district court determined that credible witness " 'would really testify in a way to implicate and accuse' " defense counsel in a scheme to keep witnesses from testifying), *cert. denied*, 110 S. Ct. 70 (1989); *Cancilla*, 725 F.2d at 868 n.1 (court assumed "arguendo that counsel did engage in such criminal activities"); *Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 128 (3d Cir. 1984) (law enforcement officers saw attorney enter defendant's residence, heard toilet flush several times, and later discovered cocaine in septic tank).

In stark contrast to the cases in which an actual conflict has been found, the evidence before Judge Sand indicated that the prosecutor's hysterics were without foundation in fact or law. During his tirade on March 16, the prosecutor alluded to possible violations of Model Code of Professional Responsibility DR 7-102 and EC 7-26 if Jones contradicted the statements made in the proffer letter. These provisions prohibit an attorney from using testimony when "he knows, or from facts within his

knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." EC 7-26, N.Y. Jud. Law App. (McKinney 1975); *see also* DR 7-102, N.Y. Jud. Law App. (McKinney 1975 & Supp. 1990). Apart from the brief confusion caused by the prosecutor's ambiguous questions, at no time has there been any suggestion that the proffer letter was false, let alone that O'Neill knew or should have known it was false. After examining the proffer letter and Jones' testimony on March 16, Judge Sand determined that Jones had not contradicted the letter and so informed the government and O'Neill. At that point in time there was no actual conflict of interest, *see Lovano*, 420 F.2d at 774, and O'Neill was free to pursue a vigorous defense.

The prosecutor's contention that Jones would not be permitted to profess a lack of memory on cross-examination concerning the statements made in the proffer letter was not made in connection with the threat against O'Neill. Rather, the prosecutor was arguing that Jones' failure to remember would result in the government's offer of the proffer letter in evidence. Had the letter been admitted under these circumstances, O'Neill would have been confronted with the possibility of being called as a witness. Jones claims that because of this possibility "O'Neill could not make . . . disinterested, objective tactical decisions or give Jones . . . disinterested, objective advice." However, O'Neill prudently sought to have Jones consult with an independent attorney before considering possible alternatives. Any potential conflict here never ripened into an actual conflict because Jones told independent counsel that her testimony would be consistent with the letter.

Jones' claim also must fail because she has not demonstrated that any conflict of interest adversely affected O'Neill's performance. Jones asserts that O'Neill could have pursued a defense based on her inability to remember the statements made in the proffer letter. Of course, O'Neill could only pursue this defense if it were true. *See Nix v. Whiteside*, 475 U.S. 157, 176 (1986). There was no basis for this defense at the time of trial, because Jones consistently said that the proffer letter refreshed her memory and that it was accurate.

The proffer letter ultimately was admitted in evidence, in a redacted form, at the request of Jones. She asserts that O'Neill was made a witness against her because the prosecutor referred to the proffer letter in summation. The problem of an attorney giving testimony against his client is that the jury "may place undue weight on the testimony of an officer of the court." *Arrington*, 867 F.2d at 126. No such problem arose here, because O'Neill's name never was mentioned. *See United States v. Diozzi*, 807 F.2d 10, 14 n.8 (1st Cir. 1986).

Finally, Jones asserts an actual conflict of interest based on O'Neill's representation of other Drexel employees. Mere representation of other defendants in related cases does not constitute an actual conflict. *Cuyler v. Sullivan*, 446 U.S. at 348. Four of the five other Drexel employees represented by O'Neill had been granted immunity by the government. Jones' argument that these four employees had an interest in maintaining good relations with Drexel finds no support in the record.

Absent some showing of conflict, we cannot say that the district court abused its discretion in finding O'Neill's

actions to be the result of tactical decisions. *See id.* at 348-50. O'Neill's decision not to call Drexel's attorneys as witnesses or subpoena their notes, far from falling below an objective standard of reasonableness and professional conduct, was a legitimate trial tactic to avoid the implication that Jones was controlled by Drexel by reason of Drexel's payment of her attorney's fees.

II. *Prior False Statements*

On cross-examination, the prosecutor questioned Jones about a number of false statements she had made on applications for employment, an apartment, a driver's license, a loan, membership in the National Association of Securities Dealers, and on her income tax returns. The court ruled that, considering the fact that Jones had professed an inability to remember certain facts before the grand jury, this line of questioning would be permitted "to probe just what Miss Jones means when she says 'I don't remember.' " Jones admitted making each false statement.

On appeal, Jones asserts that the cross-examination was improper under Fed. R. Evid. 404(b), because it was pursued to prove action in conformity with a character for untruthfulness. The government contends that the questioning was proper under Fed. R. Evid. 608(b) to impeach Jones' credibility.

"Pursuant to Fed. R. Evid. 608(b), the trial judge may permit cross-examination into specific acts of misconduct if 'probative of truthfulness or untruthfulness.' " *United States v. Bagaric*, 706 F.2d 42, 65 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). Jones testified throughout the grand jury

proceedings and her trial that she could not remember important facts. The inquiry into her history of intentionally making false statements was proper because it "tend[ed] to undermine defendant's innocent explanation" that her false statements were the result of a faulty memory. 2J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[12], at 404-84 (1989). " '[T]he oftener a like act has been done, the less probable it is that it could have been done innocently.' " *Id.* at 404-84 to 404-87 (quoting 2 Wigmore, *Evidence* § 312 (3d ed. 1940)).

III. *Voir Dire*

Approximately one week after the jury's verdict, the government informed the court and defense counsel that one of the jurors had a son who was an Assistant United States Attorney for the District of New Jersey. The district court had not asked one of Jones' proposed questions on *voir dire* concerning whether any juror was, or had relatives who were, government attorneys. The court did ask, however, a number of questions concerning whether any family members or close friends had ever been a defendant in a criminal case or involved in grand jury proceedings. The court asked the occupation of any one living with the prospective juror. The court asked also whether there was any reason not covered by a specific question that would prevent a potential juror from being fair and impartial. The juror in question had said no to each of these questions.

Following the revelation of a connection with a prosecutor in another jurisdiction, the district court held a

hearing and questioned the juror in the presence of counsel. The juror explained that he did not have daily contact with his son, he had limited knowledge of his son's work, and he had not volunteered the information because he did not feel it would prevent him from being impartial.

An appellate court will not interfere with the conduct of *voir dire* unless the defendant can show a clear abuse of the district court's discretion. *United States v. Barton*, 647 F.2d 224, 230 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981). Considering the extensive inquiry into possible bias on *voir dire*, and the complete absence of any evidence that the verdict was tainted, the district court did not abuse its discretion by refusing to ask one specific question which may or may not have resulted in an exercise of a peremptory challenge by Jones.

IV. *Sentencing*

Jones challenges as unsupported by the record the enhancement of her base offense level from 12 to15 on the ground that she "substantially interfered with the administration of justice" by causing "the unnecessary expenditure of substantial government or court resources." Guidelines § 2J1.3(b)(2) & application note 1. Appellate review of a district court's sentence is limited to whether the sentence was "imposed in violation of law," was "imposed as a result of an incorrect application of the sentencing guidelines," or was "outside the applicable guideline range, and is unreasonable." 18 U.S.C. § 3742(e), (f). The factors underlying a sentence need only be proved by a preponderance of the evidence, *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989), and the

district court's findings of fact will not be disturbed unless clearly erroneous, 18 U.S.C. § 3742(e).

The record reveals that "[t]he court did not 'merely approve or disapprove' the recommendations in the presentence report." *United States v. Lanese*, 890 F.2d 1284, 1291 (2d Cir. 1989). Jones and the government both briefed and argued the issue of sentencing enhancement. The district court explicitly rejected Jones' arguments. However, the district court did not make any specific finding that Jones' perjury had resulted in any substantial expenditure of governmental resources. *Cf. United States v. Adames*, No. 89-1426 (2d Cir. March ___, 1990); *United States v. Buenrostro*, 868 F.2d 135, 137 (5th Cir. 1989) (citing *United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.), *cert. denied*, 109 S. Ct. 3257 (1989)). Moreover, we cannot say that a preponderance of evidence in the record supports the government's assertion that substantial expenditures were caused by Jones's false statements to the grand jury.

A preponderance of evidence may consist of reasonable inferences drawn from circumstantial evidence. The government need not particularize a specific number of hours expended by government employees. In some cases, when the defendant has concealed evidence and is the only known source of information, substantial interference with the administration of justice may be inferred. *See United States v. Barnhart*, 889 F.2d 1374, 1379-80 (5th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3545 (U.S. Feb. 26, 1990). The government urges such an inference here, but Jones produced in the district court, in the form of Hale's testimony and the government's application for a search warrant for Princeton/Newport's offices, substantial evidence that the government already had the

information Jones concealed. In the absence of any showing of evidence concealed by Jones and not already known by the government, we cannot conclude that unnecessary expenditures have been established by a preponderance of the evidence.

Of course, the three level enhancement for substantial interference with the administration of justice is not limited to conduct resulting in substantial expenditures of governmental resources. *Id.* It also "includes offense conduct resulting in a premature or improper termination of a felony investigation, [or] an indictment or verdict based upon perjury, false testimony, or other false evidence." Guidelines § 2J1.3 application note 1. The district court here stated that it enhanced Jones' sentence because of "three separate instances of perjury after the advice and admonitions given to the defendant, and the further perjury at the trial." Apparently it was the view of the district court that these instances of perjury resulted in substantial expenditures of governmental resources. As we have indicated, no such expenditures have been demonstrated. Moreover, these instances of perjury, standing alone, do not constitute the type of egregious conduct envisioned by the Guidelines as substantial interference with the administration of justice. Accordingly, the sentence imposed must be vacated.

## CONCLUSION

The judgment of conviction is affirmed. The sentence imposed is vacated. We remand for resentencing in accordance with the foregoing.